Bank Kerjasama Rakyat Malaysia v Cosmic Master Development Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22M-71–05 OF 2015
ATAN MUSTAFFA JC
22 DECEMBER 2021

Contract — Termination — Validity — Plaintiff bank terminated financing facilities — Whether plaintiff wrongfully and unlawfully terminated, recalled, and discontinued financing facilities — Whether plaintiff was to be paid instalments for facilities from housing development account and other securities — Whether plaintiff was to use proceeds from securities first before demanding payments from defendants — Whether plaintiff entitled to end financing facilities — Whether facilities were wrongly revoked or cancelled — Whether plaintiff breached their obligation under facilities — Whether plaintiff wrongly filed winding up petition and the present action — Whether business collaboration agreement and the supplementary agreement were terminated as a result of plaintiff's termination of facilities and enforcing the judgment in default, including the winding up action — Whether guarantees were void

Sykt Perumahan Negara Bhd ('SPNB') had appointed the first defendant to be the design and build contractor for a project to develop affordable houses known as 'Taman Seri Molek Perdana' ('the project') via several agreements including the development agreement, the business collaboration agreement, and the supplementary agreement ('the SPNB agreements'). The defendants had also obtained three financing facilities from the plaintiff to finance the project. On the expiry dates of the financing facilities, all the three financing facilities remained outstanding. The plaintiff had issued letter of demands for each of the financing facilities, but no payment was forthcoming, consequently, the plaintiff issued notices of termination dated 10 July 2014 to the defendants and demanded the total amount outstanding. Meanwhile, SPNB had instructed the first defendant to surrender the project to SPNB as the first defendant had failed to complete the project within the stipulated time. The plaintiff then obtained a judgment in default ('the JID') for the total outstanding amount and proceeded to file a winding up petition. However, the defendants had successfully set aside the JID, and the plaintiff thereafter withdrew the winding up petition. The defendants had filed a defence and counterclaim seeking, amongst others, declaratory relief that the plaintiff had wrongfully and unlawfully terminated, recalled, and discontinued the financing facilities. The issues for the court's consideration were: (a) whether the plaintiff was to be paid the instalments for the facilities from the housing development account ('the HDA account') and other securities ie the deeds of

assignments of contract proceeds and unsold units — in relation to this issue, the defendant submitted that: (i) the terms of the facilities were varied via the supplemental letter of offer dated 30 November 2012 ('the supplemental letter of offer'); and (ii) the HDA account was controlled by the plaintiff and the plaintiff was negligent in ensuring that the payments for the facilities were made from the HDA account; (b) whether the plaintiff was to use the proceeds from the assignments of contract proceeds, designated account and unsold units, debentures and all of the security documents first before demanding any payments from the defendants — in relation to this issue, the first defendant submitted that there was no shortfall in the HDA account, as such, the facilities were wrongfully terminated by the plaintiff; (c) whether the plaintiff was entitled to end the three facilities; (d) whether the facilities were wrongly revoked or cancelled; (e) whether the plaintiff had breached their obligation under the facilities; (f) whether the plaintiff had wrongly filed the winding up petition and the present action; (g) whether the business collaboration agreement and the supplementary agreement were terminated as a result of the plaintiff's termination of the facilities and enforcing the JID, including the winding up action; and (h) whether the guarantees were void.

Held, dismissing the defendants' counterclaim with costs of RM30,000:

(1) Based on the evidence, the payment for the facilities were not only from the HDA account but was due and payable to the plaintiff even if no deductions were made from the HDA account. Even if payment should come from the HDA account, when there was any shortfall, the first defendant had to pay the difference. The contemporaneous documents showed that the first defendant never regarded payment to the plaintiff to be only from the HDA account. The terms and conditions of the facilities provided that the first defendant had the obligation to make payment for the facilities. Further, the supplemental letter of offer stated expressly that only the specific terms were varied, and other terms and conditions remained unchanged. Therefore, the terms of the facilities were not varied by way of the supplemental letter of offer ie from monthly instalment payments to payments from the HDA account, sale proceeds and sold and unsold units only. The first defendant was therefore liable under the facilities to pay by monthly instalments (see paras 53–54, 73, 76 & 78).

(2) Based on the evidence, it was clear that the HDA account was under the control of the first defendant and not the plaintiff. It was not correct for the defendants to say that the plaintiff could execute its right in the security agreements and transfer the sums of money due to it from the HDA account and take over or collect the money from the unsold units which were sold in the projects. Even if the plaintiff's officers who were signatories of the HDA Account were not called as witnesses, the presumption of adverse inference was not invoked as it was the

defendants' burden to prove how the HDA account operated. Further, the plaintiff had demonstrated through the second defendant's own admissions in cross-examination and documentary evidence that the plaintiff did not have full control of the HDA account (see paras 88 & 95).

(3) The plaintiff was not obliged to utilise the securities. Based on the terms and conditions contained in the facilities agreements, it was clear that the HDA account was assigned to the plaintiff as a security to assure payments of the instalments from the first defendant. Regardless of this security, the first defendant still had the obligation to make payments for the facilities (see paras 100–101).

(4) The defendants had failed to show that the money in the HDA account was sufficient to satisfy the repayment of the facilities. Therefore, a shortfall was created and there was an obligation on the first defendant to pay. Further, as it was the first defendant that alleged that there was sufficient money in the HDA account, the defendants had the evidential burden of proof to show this, and the evidential burden could not be shifted to the plaintiff without the defendants first proving their case. The onus was on the first defendant to produce witnesses that could testify on the HDA account, namely someone from SPNB, since the account belonged to SPNB. The plaintiff's non-calling of the relevant officers who conducted the HDA account did not attract the presumption of adverse inference (see paras 112–114).

(5) Based on the evidence, the court found that the plaintiff had valid grounds for the termination of the facilities as there was an outstanding amount under the facilities due to a shortfall, which the first defendant had failed to pay to the plaintiff, entitling the plaintiff to take action against the first defendant for the recovery of the amount outstanding. Further, based on the evidence, there was no premature recall of the facilities by the plaintiff (see paras 131 & 148).

(6) The issue of whether the plaintiff had breached its obligations under the facilities was related to the issues of whether the facilities were wrongly revoked or cancelled by the plaintiff and whether there was a breach of obligation by the plaintiff to ensure that the monies from the HDA account were used for the repayment of the facilities. These were answered in the negative above, as such, the court found that the plaintiff did not breach its obligations under the facilities (see para 149).

(7) There was no evidence from the defendants on how the termination of the facilities caused the project to be affected and could not be completed or how the termination caused the termination of the business collaboration agreement, development agreement and supplementary agreement. In addition, the first defendant's contention that the

termination of the SPNB agreements was due to the winding up petition was never pleaded by the defendants, as such, the court rejected this evidence. The court found that there was no effect on the first defendant when the facilities were terminated by the plaintiff since the facilities had already matured and all the sale prices were already due and payable (see paras 152 & 162).

(8) The plaintiff was entitled to file the winding up proceedings against the first defendant because when the winding up petition was filed, the JID was not yet set aside. The JID was a valid and perfect judgment until it was set aside. As the JID was still valid at the material time when the winding up petition was filed, the plaintiff was entitled to act upon it. The issue of whether the plaintiff had wrongfully filed this current action related to the defendants' prayer in the counterclaim for the plaintiff's claims against the defendants to be dismissed. This issue was academic because the plaintiff's main action was withdrawn with no order as to costs with liberty to file afresh. In any event, it was the court's finding above that the first defendant had an obligation to pay the instalments for the facilities and the failure of the first defendant to do so resulted in the first defendant owing monies to the plaintiff which the plaintiff sought to recover against the defendants in the main action. Therefore, the plaintiff had correctly filed this action against the defendants (see paras 166–167 & 169).

(9) In relation to the issue of whether the guarantees by the second defendant and the third defendant were void, based on the defendants' submission, the success of the second defendant and the third defendant in this action would depend on whether the first defendant was successful in its action that was if the defendants could establish that the plaintiff had wrongfully and unlawfully terminated, withdrawn or discontinued the facilities and that the plaintiff had breached their obligations under the facilities. Premised on the above findings of the court that the first defendant was unsuccessful in doing so, the action by the second defendant and the third defendant was also unsuccessful (see para 173).

[Bahasa Malaysia summary

Sykt Perumahan Negara Bhd ('SPNB') telah melantik defendan pertama untuk menjadi kontraktor reka bentuk dan binaan bagi projek membangunkan rumah mampu milik yang dikenali sebagai 'Taman Seri Molek Perdana' ('projek tersebut') melalui beberapa perjanjian termasuk perjanjian pembangunan, perjanjian kerjasama perniagaan, dan perjanjian tambahan ('perjanjian SPNB'). Defendan-defendan juga telah mendapatkan tiga kemudahan pembiayaan daripada plaintif untuk membiayai projek tersebut. Pada tarikh luput kemudahan-kemudahan pembiayaan tersebut, ketiga-tiga kemudahan pembiayaan tersebut kekal tertunggak. Plaintif telah mengeluarkan surat tuntutan bagi setiap kemudahan pembiayaan tersebut,

tetapi tiada bayaran diterima, berikutan itu, plaintif mengeluarkan notis penamatan bertarikh 10 Julai 2014 kepada defendan-defendan dan menuntut jumlah yang tertunggak. Sementara itu, SPNB telah mengarahkan defendan pertama menyerahkan projek tersebut kepada SPNB kerana defendan pertama gagal menyiapkan projek tersebut dalam masa yang ditetapkan. Plaintif kemudiannya memperoleh penghakiman ingkar ('JID') bagi jumlah tertunggak tersebut dan meneruskan dengan pemfailan petisyen penggulungan. Bagaimanapun, defendan-defendan telah berjaya mengetepikan JID tersebut, dan plaintif selepas itu menarik balik petisyen penggulungan. Defendan-defendan telah memfailkan pembelaan dan tuntutan balas memohon, antara lain, relif pengisytiharan bahawa plaintif telah secara salah dan menyalahi undang-undang menamatkan, menarik semula, dan menghentikan kemudahan-kemudahan pembiayaan tersebut. Isu-isu untuk pertimbangan mahkamah adalah: (a) sama ada plaintif perlu dibayar ansuran untuk kemudahan-kemudahan tersebut daripada akaun pembangunan perumahan ('akaun HDA') dan sekuriti-sekuriti lain iaitu surat ikatan penyerahan hak hasil kontrak dan unit tidak terjual — berhubung isu ini, defendan-defendan berhujah bahawa: (i) terma-terma kemudahan-kemudahan tersebut telah diubah melalui surat tawaran tambahan bertarikh 30 November 2012 ('surat tawaran tambahan tersebut'); dan (ii) akaun HDA tersebut dikawal oleh plaintif dan plaintif cuai dalam memastikan pembayaran untuk kemudahan-kemudahan tersebut dibuat daripada akaun HDA; (b) sama ada plaintif sepatutnya menggunakan hasil daripada penyerahan hasil kontrak, akaun yang ditetapkan dan unit yang tidak terjual, debentur dan semua dokumen cagaran terlebih dahulu sebelum menuntut apa-apa bayaran daripada defendan-defendan — berhubung dengan isu ini, defendan pertama berhujah bahawa tiada kekurangan wang dalam akaun HDA, oleh itu, kemudahan-kemudahan tersebut telah ditamatkan secara salah oleh plaintif; (c) sama ada plaintif berhak menamatkan ketiga-tiga kemudahan tersebut; (d) sama ada kemudahan-kemudahan tersebut dihentikan atau dibatalkan secara salah; (e) sama ada plaintif telah melanggar kewajipan mereka di bawah kemudahan-kemudahan tersebut; (f) sama ada plaintif telah tersilap memfailkan petisyen penggulungan dan tindakan semasa; (g) sama ada perjanjian kerjasama perniagaan dan perjanjian tambahan tersebut telah ditamatkan akibat daripada penamatan kemudahan-kemudahan tersebut dan penguatkuasaan JID tersebut oleh plaintif, termasuk tindakan penggulungan tersebut; dan (h) sama ada jaminan-jaminan terbatal.

Diputuskan, menolak tuntutan balas defendan-defendan dengan kos sebanyak RM30,000:

(1) Berdasarkan keterangan-keterangan, bayaran untuk kemudahan-kemudahan tersebut bukan sahaja daripada akaun HDA tetapi adalah tertunggak dan perlu dibayar kepada plaintif walaupun

tiada potongan dibuat daripada akaun HDA. Andai kata pembayaran harus datang dari akaun HDA, apabila terdapat apa-apa kekurangan, defendan pertama perlu membayar kekurangan tersebut. Dokumen-dokumen yang dikemukakan menunjukkan bahawa defendan pertama tidak pernah menganggap bayaran kepada plaintif hanya daripada akaun HDA. Terma dan syarat kemudahan-kemudahan tersebut menyatakan bahawa defendan pertama mempunyai kewajipan untuk membuat pembayaran untuk kemudahan-kemudahan tersebut. Selanjutnya, surat tawaran tambahan tersebut menyatakan dengan jelas bahawa hanya terma khusus yang diubah, dan terma dan syarat lain kekal tidak berubah. Oleh itu, syarat kemudahan-kemudahan tersebut tidak diubah melalui surat tawaran tambahan tersebut iaitu daripada bayaran ansuran bulanan kepada bayaran daripada akaun HDA, hasil jualan dan unit terjual dan tidak terjual sahaja. Oleh itu, defendan pertama bertanggungjawab di bawah kemudahan-kemudahan tersebut untuk membayar secara ansuran bulanan (lihat perenggan 53–54, 73, 76 & 78).

(2) Berdasarkan keterangan, adalah jelas bahawa akaun HDA tersebut adalah di bawah kawalan defendan pertama dan bukannya plaintif. Adalah tidak betul bagi defendan-defendan untuk mengatakan bahawa plaintif boleh melaksanakan haknya dalam perjanjian-perjanjian sekuriti tersebut dan memindahkan jumlah wang yang perlu dibayar daripada akaun HDA tersebut dan mengambil alih atau mengutip wang daripada unit tidak terjual yang dijual dalam projek tersebut. Walaupun jika pegawai-pegawai plaintif yang merupakan penandatangan-penandatangan akaun HDA tersebut tidak dipanggil sebagai saksi, anggapan inferens bertentangan tidak boleh digunakan kerana ia adalah beban defendan-defendan untuk membuktikan bagaimana akaun HDA tersebut beroperasi. Selanjutnya, plaintif telah menunjukkan melalui pengakuan defendan kedua sendiri dalam pemeriksaan balas dan keterangan dokumentari bahawa plaintif tidak mempunyai kawalan penuh ke atas akaun HDA tersebut (lihat perenggan 88 & 95).

(3) Plaintif tidak diwajibkan untuk menggunakan sekuriti-sekuriti tersebut. Berdasarkan terma dan syarat yang terkandung dalam perjanjian-perjanjian bagi kemudahan-kemudahan tersebut, adalah jelas bahawa akaun HDA tersebut telah diserahkan kepada plaintif sebagai jaminan untuk memastikan pembayaran ansuran daripada defendan pertama. Tanpa mengira sekuriti ini, defendan pertama masih mempunyai kewajipan untuk membuat pembayaran untuk kemudahan-kemudahan tersebut (lihat perenggan 100–101).

(4) Defendan-defendan telah gagal untuk menunjukkan bahawa wang dalam akaun HDA tersebut adalah mencukupi untuk membayar balik kemudahan-kemudahan tersebut. Oleh itu, terdapat kekurangan wang

dan terdapat kewajipan ke atas defendan pertama untuk membayar. Selanjutnya, oleh kerana defendan pertama yang mendakwa bahawa terdapat wang yang mencukupi dalam akaun HDA tersebut, defendan-defendan mempunyai beban pembuktian keterangan untuk menunjukkan perkara ini, dan beban keterangan tidak boleh dialihkan kepada plaintif tanpa defendan-defendan terlebih dahulu membuktikan kes mereka. Tanggungjawab adalah ke atas defendan pertama untuk mengemukakan saksi-saksi yang boleh memberi keterangan mengenai akaun HDA tersebut, iaitu seseorang daripada SPNB, kerana akaun tersebut adalah milik SPNB. Kegagalan plaintif untuk memanggil pegawai-pegawai berkaitan yang menguruskan akaun HDA tersebut tidak menarik anggapan inferens bertentangan (lihat perenggan 112–114).

(5) Berdasarkan keterangan, mahkamah mendapati bahawa plaintif mempunyai alasan yang sah untuk menamatkan kemudahan-kemudahan tersebut kerana terdapat jumlah tertunggak di bawah kemudahan-kemudahan tersebut disebabkan oleh kekurangan wang, yang mana defendan pertama gagal membayar kepada plaintif, yang melayakkan plaintif untuk mengambil tindakan terhadap defendan pertama bagi mendapatkan semula jumlah tertunggak tersebut. Selanjutnya, berdasarkan keterangan, tiada penarikan semula yang pramatang ke atas kemudahan-kemudahan tersebut oleh plaintif (lihat perenggan 131 & 148).

(6) Isu sama ada plaintif telah melanggar kewajipannya di bawah kemudahan-kemudahan tersebut adalah berkaitan dengan isu sama ada kemudahan tersebut telah dihentikan atau dibatalkan secara salah oleh plaintif dan sama ada terdapat pelanggaran kewajipan oleh plaintif untuk memastikan wang daripada akaun HDA tersebut telah digunakan untuk pembayaran balik kemudahan-kemudahan tersebut. Ini telah dijawab secara negatif di atas, oleh itu, mahkamah mendapati bahawa plaintif tidak melanggar kewajipannya di bawah kemudahan-kemudahan tersebut (lihat perenggan 149).

(7) Tiada keterangan daripada defendan-defendan tentang bagaimana penamatan kemudahan-kemudahan tersebut menyebabkan projek tersebut terjejas dan tidak dapat disiapkan atau bagaimana penamatan tersebut menyebabkan penamatan perjanjian kerjasama perniagaan, perjanjian pembangunan dan perjanjian tambahan tersebut. Selain itu, hujah defendan pertama bahawa penamatan perjanjian SPNB adalah disebabkan petisyen penggulungan tidak pernah diplid oleh defendan-defendan, justeru, mahkamah menolak keterangan ini. Mahkamah mendapati tiada kesan ke atas defendan pertama apabila kemudahan-kemudahan tersebut ditamatkan oleh plaintif memandangkan kemudahan-kemudahan tersebut telah pun matang dan

semua harga jualan telah pun menjadi tertunggak dan perlu dibayar (lihat perenggan 152 & 162).

(8) Plaintif berhak memfailkan prosiding penggulungan terhadap defendan pertama kerana semasa petisyen penggulungan difailkan, JID tersebut belum lagi diketepikan. Penghakiman ingkar adalah penghakiman yang sah dan sempurna sehingga ia diketepikan. Memandangkan JID tersebut masih sah pada masa material apabila petisyen penggulungan difailkan, plaintif berhak untuk bertindak ke atasnya. Isu sama ada plaintif telah secara salah memfailkan tindakan semasa ini adalah berkaitan dengan permohonan defendan dalam tuntutan balas supaya tuntutan plaintif terhadap defendan ditolak. Isu ini telah menjadi akademik kerana tindakan utama plaintif telah ditarik balik tanpa perintah mengenai kos dengan kebebasan untuk memfailkan semula. Walau apa pun, mahkamah telah membuat dapatan di atas bahawa defendan pertama mempunyai kewajipan untuk membayar ansuran untuk kemudahan tersebut dan kegagalan defendan pertama berbuat demikian menyebabkan defendan pertama berhutang wang kepada plaintif yang plaintif ingin dapatkan semula daripada defendan dalam tindakan utama. Oleh itu, plaintif telah memfailkan tindakan ini dengan betul terhadap defendan-defendan (lihat perenggan 166–167 & 169).

(9) Berhubung dengan isu sama ada jaminan oleh defendan kedua dan defendan ketiga adalah terbatal, berdasarkan penghujahan defendan-defendan, kejayaan defendan kedua dan defendan ketiga dalam tindakan ini bergantung kepada sama ada defendan pertama berjaya dalam tindakannya iaitu jika defendan-defendan dapat membuktikan bahawa plaintif telah secara salah dan menyalahi undang-undang menamatkan, menarik balik atau menghentikan kemudahan-kemudahan tersebut dan bahawa plaintif telah melanggar kewajipan mereka di bawah kemudahan-kemudahan tersebut. Berdasarkan dapatan-dapatan mahkamah di atas bahawa defendan pertama tidak berjaya berbuat demikian, tindakan defendan kedua dan defendan ketiga juga tidak berjaya (lihat perenggan 173).]

Cases referred to

Agromate (M) Sdn Bhd v KTS Trading Sdn Bhd [2017] MLJU 1815; [2017] 1 LNS 1707, CA (refd)

Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal [1995] 2 MLJ 770; [1995] 3 CLJ 639, CA (refd)

Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd [2010] 1 MLJ 597; [2010] 1 CLJ 269, FC (refd)

CIMB Bank Bhd v Consobiz Ventures Sdn Bhd & Ors [2018] MLJU 1233; [2018] 1 LNS 1336, HC (refd)

Dato' Low Mong Hua v Banting Hock Hin Estate Co Sdn Bhd & 8 Ors [2003] MLJU 449; [2003] 1 LNS 387, HC (refd)

Glamour Green Sdn Bhd v Ambank Bhd & Ors and another appeal [2006] MLJU 649; [2007] 3 CLJ 413, CA (refd)
Hong Xin Construction Sdn Bhd v Cosmic Master Development Sdn Bhd & Anor [2020] MLJU 2192, HC (folld)
Hong Yik Trading v Liziz Plantation Sdn Bhd [2017] 5 MLJ 398; [2017] 8 CLJ 491, FC (refd)
Loh Wai Lian v SEA Housing Corporation Sdn Bhd [1987] 2 MLJ 1; [1987] 1 LNS 37, PC (refd)
Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] AC 749, HL (refd)
Mohamad Fauzi bin Che Rus v JR Joint Resources Holdings Sdn Bhd [2016] MLJU 62; [2016] 6 CLJ 266, HC (folld)
Nabors Drilling (Labuan) Corp v Lembaga Perkhidmatan Kewangan Labuan [2020] 12 MLJ 54; [2020] 10 CLJ 732, FC (refd)
Selvaduray v Chinniah [1939] 1 MLJ 253; [1939] 1 LNS 107, SC (refd)
Tan Tee Peng v Tenaga Nasional Berhad [2016] MLJU 1226; [2016] 1 LNS 574, HC (refd)
Wasco Coatings Malaysia Sdn Bhd v Nacap Asia Pacific Sdn Bhd & Ors [2015] MLJU 2110; [2015] 5 CLJ 462, CA (refd)
Wong Pa Hock v American International Assurance Co Ltd & Anor [2001] MLJU 688; [2002] 2 CLJ 267, HC (refd)

Legislation referred to

Evidence Act 1950 ss 90A, 101, 114(g)

Mohammad Zaid Daud (with Mohd Munzeer Zainul Abidin) (Yusfarizal Aziz & Zaid) for the plaintiff.
G Ravi (with C Sivasankaran) (G Ravi) for the defendant.

Atan Mustaffa JC:

[1] This is an action by the defendants in their counterclaim seeking, amongst others, declaratory relief that the plaintiff wrongfully and unlawfully terminated, recalled and discontinued the financing facilities provided by the plaintiff to the first defendant Cosmic Master Development Sdn Bhd ('Cosmic').

[2] After a full trial, this court dismissed the defendants' counterclaim with costs. The defendants appealed.

FACTS

[3] Cosmic, which is a property development contractor, and Syarikat Perumahan Negara Bhd ('SPNB'), entered into a development agreement dated 22 January 2007 ('the development agreement'). SPNB is a company

owned by Minister of Finance (Incorporated) whose activity is in developing and providing affordable housing accommodation at appropriate locations in Malaysia to meet the housing requirements of the public, particularly within the lower and middle-income group. Under the development agreement, Cosmic was appointed by SPNB to be the design and build contractor for a project to develop affordable houses known as 'Taman Seri Molek Perdana' ('the project'). The project was due for completion in 36 months.

[4] The plaintiff approved and disbursed a Term Financing-i Facility amounting to RM27,680,000 under the principle of Bai Al-Istina' ('the first facility') to Cosmic to finance Cosmic as the design and build contractor of the project. The first facility was documented by a letter of offer dated 6 March 2007, an asset sale agreement dated 8 January 2008, an asset purchase agreement dated 8 January 2008, a letter of extension of facility tenure dated 15 April 2011 and a supplementary letter of offer dated 30 November 2012. The plaintiff also provided a bank guarantee to Cosmic for RM9,269,136 documented by Bank Guarantee-i Facility Agreement between Cosmic and the plaintiff dated 26 September 2008 which is not a subject of this action.

[5] The first facility was secured by assignments, a debenture and third-party charges, documented by a deed of assignment of contract proceeds dated 8 January 2008, a deed of assignment of designated account dated 8 January 2008, a debenture dated 8 January 2008, a charge (Presentation No 112/2008) dated 14 January 2008 by Questronic Ventures Sdn Bhd ('Questronic') and a charge (Presentation No 211/2008) dated 14 January 2008 by Grace Properties Sdn Bhd ('Grace Properties'). The second defendant and the third defendant, directors of Cosmic, guaranteed the payment of Cosmic under the first facility via a joint and several guarantee agreement dated 8 January 2008. The first disbursement of the first facility was made on 31 January 2008.

[6] Subsequently, the plaintiff approved and disbursed a Modal Kerja-i Facility amounting to RM10m under the principle of Bai-Al-Inah ('the second facility') to further finance Cosmic under the project. The second facility was documented by a letter of offer dated 8 April 2011, an asset sale agreement dated 17 October 2011, an asset purchase agreement dated 17 October 2011, a supplementary letter of offer dated 30 November 2012, amended letter of offer dated 9 September 2011 and amended letter of offer dated 15 December 2011.

[7] The second facility was secured by assignments and third-party charges, documented by a deed of assignment of contract proceeds dated 17 October 2011, a charge (Presentation No 5647/2011) dated 17 October 2011 by Questronic, a charge (Presentation No 5646/2011) dated 17 October 2011 by

Grace Properties and deed of assignment (unsold units) dated 28 December 2011. The second defendant and the third defendant guaranteed the payment of Cosmic under the second facility via a directors guarantee dated 17 October 2011. The first disbursement of the second facility was made on 9 November 2011.

[8] The project was not completed in 36 months and on 25 July 2011, Cosmic and SPNB entered into a project business collaboration agreement ('the business collaboration agreement'). Under this agreement, SPNB agreed to collaborate with Cosmic and to allow Cosmic to have full control and management of the project including securing the necessary financing to complete the project, assuming all responsibilities and liabilities with ultimate supervision by SPNB, subject to SPNB successfully recovering all monies as provided in the business collaboration agreement. This was with a view to revive and expedite the completion of the project. Subsequently, a supplementary agreement dated 22 April 2016 ('the supplementary agreement') was executed by Cosmic and SPNB to supplement, vary and amend the terms of the business collaboration agreement. The development agreement, business collaboration agreement and supplementary agreement are referred to together as 'the SPNB agreements'.

[9] Then, the plaintiff approved and disbursed a Berjangka-i Facility amounting to RM10m under the principle of Bai-Al-Inah ('the third facility') to further finance Cosmic under the project. The third facility was documented by a letter of offer dated 14 March 2013, an asset sale agreement dated 14 March 2013 and an asset purchase agreement dated 14 March 2013.

[10] The third facility was secured by a debenture, assignments and third-party charges, documented by a debenture dated 28 March 2013, a supplemental agreement third party deed of assignment (by way of sale proceeds) dated 28 March 2013, a supplemental agreement deed of assignment of unsold unit dated 28 March 2013, a charge (Presentation No 1727/2013) dated 11 April 2013 by Questronic and a charge (Presentation No 1728/2013) dated 28 March 2013 by Grace Properties. The second defendant and the third defendant guaranteed the payment of Cosmic under the third facility via a guarantee dated 28 March 2013. The first disbursement of the third facility was made on 10 April 2013.

[11] All the documentation for the facilities is referred together as 'facilities agreements'. The joint and several guarantee dated 8 January 2008, the guarantee dated 17 October 2011 and the guarantee dated 28 March 2013 are referred to together as 'the guarantees'.

[12] The initial tenure for the first facility and second facility were 36 and 22 months respectively. The original expiry date of the first facility was 3 January 2011 and for the second facility in September 2013. Pursuant to the supplementary letter of offer dated 30 November 2012 for the first facility and the supplementary letter of offer dated 30 November 2012 for the second facility, the expiry dates of the first facility and second facility were extended to 28 February 2014. Pursuant to the terms of the third facility, the facility expired on 10 July 2014. On these expiry dates, the first facility, second facility and third facility (together, 'the facilities') remained outstanding. Earlier, the plaintiff issued notices of demand to Cosmic, the second defendant and third defendant for each of the facilities on 29 May 2014 and 19 June 2014 for the amount outstanding. The plaintiff then issued notices of termination dated 10 July 2014 to Cosmic, the second defendant and third defendant for each of the facilities on 10 July 2014 to terminate the facilities and demand for the total amount outstanding for the facilities. Cosmic failed to complete the project within the stipulated time and SPNB by way of a letter 30 October 2019 instructed Cosmic to surrender the project to SPNB.

[13] As no payment was forthcoming from the defendants, the plaintiff filed an action against the defendants on 14 May 2015 for the recovery of the sums of RM21,926,273.62 as at 11 May 2015 for the first facility and second facility and RM10,683,574.24 for the third facility as at 11 May 2015 together with compensation for late payment.

[14] The plaintiff obtained judgment in default against the defendants on 30 June 2015 ('the JID') and filed a winding up petition on 19 August 2019 under Companies (Winding Up) Petition No JA-28NCC-190–08 of 2019 ('the winding up petition'). However, the defendants were able to set aside the JID on 14 February 2020 and the plaintiff thereafter withdrew the winding up petition on 26 February 2020.

[15] On 17 March 2020, the defendants filed a defence and counterclaim. In the counterclaim, the defendants contended that the facilities were wrongfully terminated by the plaintiff and the defendants prayed for the following declarations:

(a) a declaration that the plaintiff wrongfully and unlawfully terminated, recalled and discontinued the facilities;

(b) a declaration that the plaintiff breached its obligations under the facilities;

(c) damages to be assessed for losses suffered by the defendants;

(d) damages to be assessed for the losses suffered by the defendants arising from the breach of the SPNB agreements;

(e) a declaration that the guarantees are void or set aside;

(f) an order for the guarantees to be surrendered by the plaintiff to be cancelled immediately;

(g) the plaintiff's claims against the defendants be dismissed;

(h) aggravated damages of RM15m; and

(i) exemplary damages of RM15m.

[16] The plaintiff thereafter withdrew the original action on 18 May 2020 and served notices of demand afresh. The defendants maintained their counterclaim for wrongful termination and hence this present suit.

THE DEFENDANTS' CASE

[17] The defendants' case is that the plaintiff had wrongly terminated the facilities provided to Cosmic when the plaintiff regarded that Cosmic had defaulted in its obligations to repay the facilities. The defendants contended that the plaintiff should have used the security instruments for the financing payments but had failed to do so.

[18] The defendants contended that the plaintiff and Cosmic had agreed that the plaintiff will use the proceeds of sale of the project in the Housing Development Account (HDA) Account ('the HDA account') and proceeds from unsold unit as provided under the relevant deeds of assignment for payment of the facilities. Also, the plaintiff should have enforced the debentures and legal charges for the repayment of the facilities.

[19] The defendants also contended that the plaintiff had prematurely terminated the facilities in July 2014 as the defendants deemed that the tenures of the facilities ended on 28 December 2014 pursuant to the supplementary letters of offer dated 30 November 2012 for the first facility and second facility.

[20] On the basis of the above, the defendants contended that the plaintiff had failed to comply with the express terms of the agreements and had wrongfully withdrew, cancelled or terminated the facilities. The defendants also contended that the guarantees signed by the second defendant and the third defendant are void, not applicable and enforceable by the plaintiff. According to the defendants, they also have no liability under the facilities.

[21] The defendants further contended that as a result of the actions of the plaintiff in terminating the facilities, the defendants suffered losses arising from the termination of the business collaboration agreement and supplementary agreement causing Cosmic to be unable to complete the project.

[22] Additionally the defendants contended that the plaintiff had wrongfully obtained the JID which was subsequently set aside. Thus, the plaintiff's filing of the winding up petition was wrongful which led Cosmic to suffer loss and damages.

THE PLAINTIFF'S CASE

[23] The plaintiff's case is that the defendants breached the facilities agreements when they failed to pay the sale price of the facilities to the plaintiff which were to be made by instalment payments to the plaintiff as provided in the facilities agreements. In this respect the plaintiff did not have any obligation to use the security instruments for the financing payments and there was no obligation on the plaintiff to use the proceeds from the assignments of contract procceds, designated account and unsold units, debentures and all of the security documents first before demanding any payments from the defendants.

[24] The plaintiff contended that the termination of the facilities was done correctly as Cosmic had defaulted in its obligations to repay the facilities. The plaintiff further contended that the termination of the facilities did not cause the SPNB agreements to be terminated.

ISSUES

[25] The plaintiff and the defendants filed issues to be tried separately. The issues were restated by the defendants in their written submissions as follows:

(a) whether plaintiff was to be paid the instalments for the facilities from the HDA account and other securities: the deeds of assignments of contract proceeds and unsold units;

(b) whether plaintiff was to use the proceeds from the assignments of contract proceeds, designated account and unsold units, debentures and all of the security documents first before demanding any payments from the defendants;

(c) whether the plaintiff was entitled to end the three facilities;

(d) whether the facilities were wrongly, revoked or cancelled;

(e) whether the plaintiff had breached their obligation under the facilities; and

(f) whether the plaintiff had wrongfully filed winding up petition and this current action.

[26] The plaintiff also put forward an additional issue: whether the business collaboration agreement and the supplementary agreement were terminated as a result of the plaintiff's termination of the facilities and enforcing the JID, including the winding up action.

[27] The defendants also listed out another issue, read as 'whether the plaintiff had made a false representation in inducing the plaintiff to execute all the facility, security and guarantee documents'. However, no evidence was led on this issue. The court will not address this issue.

[28] These grounds will be structured based on the issues as laid out above.

WITNESSES

[29] At the trial the defendants produced one witness who was Chok Kim Sin, the second defendant and Director of Cosmic (DW1), whose examination in chief was given via his witness statements marked as WSDW1A and WSDW1B.

[30] The plaintiff produced two witnesses:

(a) Nuryusmalia@Amal Taqiah bt Yusof (PW1), an officer of the plaintiff who held the post of Ketua Operasi & Litigasi Bank Kerjasama Rakyat Malaysia, whose examination in chief was given via her witness statement marked as WSPW1; and

(b) Zaifirol bin Shaharudin (PW2), an officer of the plaintiff who held the post of Eksekutif Kanan, Jabatan Pemulihan Perniagaan Bank Kerjasama Rakyat Malaysia, whose examination in chief was given via his witness statement marked as WSPW 2.

FINDINGS

Whether the plaintiff was to be paid the instalments for the facilities from the HDA account and other securities: the deeds of assignments of contract proceeds and unsold units

Payment from securities

[31] The defendants' contention is that the plaintiff was supposed to use the monies available to the plaintiff from the assignments of unsold units and assignments of contract proceeds for payment of the facilities. This was pleaded at para 88 of the defence and counterclaim:

Defendan-Defendan juga menyatakan bahawa tidak ada sebarang pembayaran yang perlu dibuat dan pembayaran pembiayaan adalah pembayaran daripada hasil jualan projek dan akaun HDA dan bayaran untuk pembiayaan 'was not due & payable' to the Plaintif.

[32] The defendants contended that they have acted upon the understanding and representations of the plaintiff that it did not have to pay any monies for the facilities and that all payments have to come from the HDA account or sale proceeds of the project. They further contended that the plaintiff breached these understanding and representations when the plaintiff did not use the monies available from the assignments of unsold units and contract proceeds by withdrawing cancelling or terminating the facilities.

[33] The defendants rely on certain provisions in the facilities agreements to support their positions above:

(a) in the supplementary letter of offer dated 30 November 2012 in respect of the first facility it is stated that the 'payment of the New TF-i and existing Term Financing-i and Revolving Credit-i Facilities shall be by way of 60% of the sales proceeds captured in the HDA account after excluding the mandatory deduction to SPNB'. The defendants contended that this had effectively varied the terms of the terms of the first facility and no instalments were due from Cosmic;

(b) the letter of offer dated 8 April 2011 for the second facility lists the payout of the second facility by way of '100% deductions of the sale proceeds captured in the HDA account maintained by SPNB';

(c) in the amended letter of offer dated 9 September 2011 in respect of the second facility it is stated that cl E of the letter of offer dated 8 April 2011 is amended to read 'deed of assignment on all sales proceeds of the project captured in the HDA account by Syarikat Perumahan Negara (SPNB) duly executed by the Customer and registered';

(d) in the deed of assignment of contract proceeds dated 17 October 2011 for the second facility it is stated that all proceeds from the completion of the development of affordable homes were assigned by Cosmic to the plaintiff;

(e) in the supplementary letter of offer dated 30 November 2012 in respect of the second facility it is stated the payment for the facility should be by way of 60% of the deduction of the sale proceeds captured in the HDA account after excluding the mandatory deduction to SPNB received from the sale of the project;

(f) in the amended letter of offer dated 15 December 2011 for the second facility it is stated that the payout was 'through redemption of the individual units sold. The redemption shall be 80%. However only 80%

of the redemption amount from each of the progress payout received will be used towards repayment of the facility ...' Further it is stated that payment of financing arising under the facilities were as the following precedence:

No	Facility	Redemption Rate from HDA in %
i	Term Financing-i (RM27,680,000)	40%
ii	Kredit Pusingan-i (RM10,000,000)	40%

(g) in the letter of offer to sell commodity dated 14 March 2013 for the third facility it is stated that the payment of the sale price is by at cl 9.0 that 'the payment of the sale price of new TF-i and existing Term Financing-i and Revolving Credit-i facilities shall be by way of 60% deductions of the sales proceeds captured in the HDA account ...; and

(h) in the supplemental agreement third party deed of assignment dated 28 March 2013 for the third facility it is stated that in Recital VI that ' ... the customer shall cause the Assignor to assign the Assignors rights tittle and interest in and to the sale proceeds under the Third Party deed of assignment (sale proceeds) in favor of the Bank upon the terms and conditions and stipulations herein after appearing'.

[34] The defendants submitted that the plaintiff had wrongly terminated the facilities provided to Cosmic when the plaintiff regarded that Cosmic had defaulted in its obligations to repay the facilities. The defendants contended that the plaintiff should have used the security instruments for the financing repayments but had failed to do so. These instruments are:

(a) deed of assignment of contract proceeds dated 8 January 2008 in respect of of the first facility;

(b) deed of assignment of designated account dated 8 January 2008 in respect of the first facility;

(c) debenture dated 8 January 2008 in respect of the first facility;

(d) third party first legal charge dated 17 October 2011 in respect of the second facility by Questronic;

(e) third party second legal charge dated 17 October 2011 in respect of the second facility by Grace Properties;

(f) supplementary agreement of third party deed of assignment dated 28 March 2013 in respect of the third facility;

(g) supplementary deed of assignment of unsold units dated 28 March 2013 in respect of the third facility;

(h) debenture dated 28 March 2013 in respect of the third facility; and

(i) power of attorney between SPNB and defendant dated 3 October 2020.

[35] On the basis of the above, the defendants submitted that the plaintiff had failed to comply with the express terms of the agreements and had wrongfully withdrew, cancelled or terminated the facilities. The defendants also contended that the guarantees signed by the second defendant and the third defendant are void, not applicable and enforceable by the plaintiff. According to the defendants, they also have no liability under the facilities.

[36] The defendants submitted that the court has to construe the terms of the facilities as it was always the intention of the parties that the facilities would be repaid from the HDA account, the sale proceeds and any unsold units. To support this submission the defendants referred the court the case of *Glamour Green Sdn Bhd v Ambank Bhd & Ors and another appeal* [2006] MLJU 649; [2007] 3 CLJ 413 where it was observed by the court that in interpreting loan documents the factual matrix forming the background to these documents are relevant to satisfy the objective test to ascertain the imputed intention of the parties.

[37] The defendants invited the court to examine the notices of demand dated 29 May 2014 and 19 June 2014 together with the notices of termination dated 10 July 2010 and state that these letters state that instalments was to be paid which was contrary to the agreement that repayments of the facilities were to be made from the HDA account controlled by the plaintiff.

[38] The defendants pointed out to the court that PW1 had admitted that there was no instalment due based on the letter of offer and facilities agreements where the payments are to come from the HDA account.

[39] The defendants submitted that there has been a change in the payment method from repayments of the facilities by monthly instalment to repayments to be made from the sales proceeds of the project when the amended letter of offer dated 15 December 2011 for the second facility was issued. It was stated in the letter that the payout was up to 80% of the redemption amount from the progress payout received. The defendants contended that this same arrangement was stated in the letter of offer dated 9 September 2011 relating to the second facility.

[40] The defendants further submitted that as the repayments are from the HDA account then the defendants can only be liable if there is a shortfall. Thus, as there had been no notice of shortfall given, the facilities were wrongfully terminated by the plaintiff.

[41] The defendants also submitted that it is not known how much has been

paid to date towards the repayment of the facilities as the plaintiff has not produced the accounts for both the HDA and for the facilities. However, from the HDA bank statement (P33) and the facilities statements of account ending in May 2014 (P34, P35 and P36) tendered by the plaintiff it is shown that the accounts are active.

[42] The defendants submitted that the HDA bank statement (P33) and the plaintiff's facilities statements of account (P34, P35 and P36) should be disregarded as PW1 stated in cross-examination that she had no personal knowledge of the accounts and PW2 stated in cross- examination that he was not sure about the HDA account. The defendants submitted that as the HDA bank account was controlled by the plaintiff, an adverse inference is to be drawn against the plaintiff pursuant to s 114(g) of the Evidence Act 1950 for not calling the relevant officers who were signatories to the account.

[43] The defendants submitted that phase one of the project was completed and as such the plaintiff was entitled to use the securities held by the plaintiff.

[44] The plaintiff submitted that Cosmic had the obligation to make repayments of the facilities by way of monthly instalments and not exempt from these payments because the facilities agreements provide payments by deduction from the HDA account.

[45] The plaintiff referred the court to the terms and conditions of the facilities, which provide that Cosmic has the obligation to make payment for the facilities:

(a) cl 3.1.1 of the asset sale agreement dated 8 January 2008 for the first facility provides:

> CMDSB shall pay to the BKRM the sale price CMDSB shall pay to the BKRM the sale price by the instalments in the amounts and at the times set out in the Second Schedule hereto or in accordance with the Payment Schedule as sent to CMDSB by BKRM the first of such payments to commence on the same month of the first disbursement date.

(b) cl A(d) of the second schedule in the asset sale agreement dated 8 January 2008 for the first facility provides:

> CMDSB is to settle the difference to BKRM should any payment sum received falls short of the respective instalments due in the above Schedule.

(c) cl 2 of the asset sale agreement dated 17 October 2011 for the second facility provides:

> The Customer shall pay to the Bank the sale price in accordance with Syariah principle of Bai' Al-Inah in the amounts, at the times and in the manner

specified in the Second Schedule hereto or by instalments of such other amounts as shall be mutually agreed between the parties hereto.

(d) cl B of the second schedule in the asset sale agreement dated 17 October 2011 for the second facility provides:

In the event of any shortfall of item A above, the Customer shall settle the difference based on the following schedule ...

(e) cl 3.1 of the asset sale agreement dated 14 March 2013 for the third facility provides:

The Customer shall pay to the Bank the sale price by the instalments (hereinafter referred to as the 'Instalments') in the manner set out in THIRD SCHEDULE hereto or by Instalments of such other amount as shall be mutually agreed between the parties hereto.

(f) cl 1(a)(2) of the third schedule of the asset sale agreement dated 14 March 2013 for the third facility provides:

In the event of any shortfall of the above, the Customer shall settle the difference based on the schedule below:-

The payment of the sale price of the Facility shall be by fifteen (15) monthly instalments as follows:

Instalment	Amount Per Instalment(RM)	No of Instalments	Total (RM)
1st – 14th	88,334	14	1,236,676
15th	10,088.324	1	10,088,324
	TOTAL	15	11,325,000

[46] Counsel for the plaintiff highlighted to the court that there were several admissions made by DW1 in cross-examination that Cosmic had agreed to pay the sale price:

(a) in respect of the first facility, the evidence in DW1's cross-examination was:

MM: And Clause 3, payment of sale price, I put it to you that Cosmic had agreed to pay the sale price to Bank Rakyat. You agree with me?

Chok: Yes, I agree.

(b) in respect of the second facility, the evidence in DW1's cross-examination was:

MM: So we go straight to the agreement, this is the asset sale agreement. Clause 2, you've agreed that you will pay to the Bank the sale price. The Customer shall pay to the Bank the sale price in accordance with Bai Al'Inah. Correct?

Chok: Yes

(c) in respect of the third facility, the evidence in DW1's cross-examination was:

MM: Ok, thank you. Ok, so, now we proceed to the asset sale agreement which is at page 549. So, it's basically the same thing. Clause 3, says that customer shall pay the sale price, correct? And it shall be in accordance to the Third Schedule at page 539. This one, right?

Chok: Yes

[47] The plaintiff submitted that Cosmic has the obligation to pay the sale price of the facilities and that even if payment should come from the HDA account, when there is any shortfall, Cosmic is to pay the difference. The evidence in DW1's cross-examination was:

MM: So, when there is a shortfall, Defendan has to pay the difference, correct?

Chok: Yes, right.

[48] The plaintiff submitted that the payment for the facilities did not come only from the HDA account. The plaintiff showed that the movement of monies in and out of the HDA account is shown from the statements of account for the facilities from December 2013 to May 2014 (exhs P34, P35 and P36). Between 31 December 2013 to 31 May 2014 payments were made towards the facilities but from the HDA bank statement during this period (P33), no withdrawal was made from the HDA account for the above payments of the facilities. DW1 confirmed in cross-examination that exhs P34, P35 and P36 are the statements of account for the HDA account:

MM: From pages 13 until 23, is the statement of account from December 2013 all the way to May 2014. So this is the statement of account for the HDA account?

Chok: Yes.

[49] The plaintiff submitted that no withdrawals were made from the HDA account to make payment to the plaintiff despite there being monies in the HDA account. This was admitted to by DW1 in cross-examination summarised as follows:

(a) there was no withdrawal from 31 December 2013 until 3 January 2014;

(b) the HDA account bank statement does not reflect any payments for the second facility on 15 January 2014 for profit payment for the sums of RM4,359.67, RM5,935.15, RM6,573.70, RM5,551.12 and RM8,764.93 and for advance profits for the sums of RM5,332.41, RM6,573.70 and RM4,090.30;

(c) the HDA account bank statement does not reflect any payments for the third facility on 15 January 2014 for profit payment of RM73,041.10 and on 10 April 2014 for profit payment of RM61,192.63;

(d) no withdrawals were made from the HDA account to make payments for the third facility to the plaintiff for in February, March, April and May 2014;

(e) the payments of RM50,000 in February 2015 and RM2m in September 2015 made by Cosmic to the plaintiff to defer legal proceedings was not from the HDA account but from Cosmic's own Alliance Bank account which were the only payments made by Cosmic from 2014 until 2016; and

(f) all the payments made by Cosmic to the plaintiff were actually payments from Cosmic's own bank account at Alliance Bank.

[50] In cross-examination, plaintiff's counsel referred DW1 to an earlier case with Hong Xin Construction Sdn Bhd ('Hong Xin'), Cosmic's sub contractor in the project. DW1 admitted in cross-examination that payment from Hong Xin under the project was made from the HDA account. The *Hong Xin* case is reported in *Hong Xin Construction Sdn Bhd v Cosmic Master Development Sdn Bhd & Anor* [2020] MLJU 2192. Cosmic's defence in the *Hong Xin* case in resisting Hong Xin's claim is also that payment to Hong Xin is from the HDA account. Cosmic failed to defend the action.

[51] With regards to SPNB, DW1 also admitted in cross-examination that no payments were made to SPNB from the HDA account.

[52] The plaintiff referred the court to contemporaneous documentary evidence to show that Cosmic had never made payments to the plaintiff from the HDA account or instructed the plaintiff to take the monies from the HDA account:

(a) in Cosmic's appeal letter dated 25 July 2016 to the plaintiff, Cosmic informed the plaintiff that Cosmic had fully utilised the monies from the HDA account 'to finish the remaining balance work' and not for repayment to the plaintiff. Cosmic stated, 'For your information, after the last drawn down from HDA account on March 2016 and June 2016, we had fully utilised the monies to site to finish the remaining balance works';

(b) Cosmic's letter dated 6 July 2018 shows that it did not regard that the payment for the facilities are from the HDA account. In the letter Cosmic requested that payment to Hong Xin be made via 100% payment from the HDA account itself. DW1 admitted in

cross-examination that Cosmic requested from SPNB to make 100% full payment from HDA account to Hong Xin; and

(c) further in Cosmic's own letter dated 5 August 2014 in response to the notice of terminations by the plaintiff, Cosmic did not instruct the plaintiff to take monies from the HDA account but only requested the plaintiff to hold legal proceedings and undertook to pay the balance, as admitted by DW1 in cross-examination.

[53] From the evidence above, it is the court's finding that the payment for the facilities were not only from the HDA account but was due and payable to the plaintiff even if no deductions are made from the HDA account. Even if payment should come from the HDA account, when there is any shortfall, Cosmic has to pay the difference. Contemporaneous documents show that Cosmic never regarded payment to the plaintiff to be only from the HDA account.

[54] The court is also satisfied that the terms and conditions of the facilities provide that Cosmic has the obligation to make payment for the facilities. This was provided as such in cl 3.1.1 and cl A (d), second schedule of the first facility asset sale agreement; cl 2 and cl B, second schedule of the second facility asset sale agreement; and cl 3.1 and cl 1(a)(2), third schedule of the third facility asset sale agreement.

[55] DW1's admission in his cross-examination that Cosmic agreed to pay the sale price as provided in cl 3 of the first facility asset sale agreement, cl 2 of the second facility asset sale agreement and cl 3 of the third facility asset sale agreement also confirmed that the payments for the facilities were due and payable to the plaintiff even if no deductions are made from the HDA account.

[56] Statements of account for the facilities from December 2013 to May 2014 (exhs P34, P35 and P36) also clearly show that payment for the facilities did not come only from the HDA account. The movement of monies in and out of the HDA account shown from these statements of account reflect that between 31 December 2013 to 31 May 2014 payments were made towards the facilities but from the HDA bank statement during this period (exh P33), no withdrawal was made from the HDA account for the above payments of the facilities. This was confirmed by DW1 in cross-examination.

[57] Also, in cross-examination, DW1 admitted that no withdrawals were made from the HDA account to make payment to the plaintiff despite there being monies in the HDA account.

[58] It is also relevant that when Cosmic made payments to the plaintiff to defer legal proceedings, the payments were not made from the HDA account but from Cosmic's Alliance Bank account and these payments of RM50,000 and RM2m were the only payments made by Cosmic, as admitted by DW1 in cross-examination.

[59] DW1 admitted in cross-examination that all the payments made to the plaintiff were from Cosmic's Alliance Bank account. Thus, the court accepts that no payments were ever made from the HDA account to the plaintiff for the repayment of the facilities. This is contrary to the defendants' position that payment for the facilities only come from the HDA account.

[60] Cosmic had also utilised the monies from the HDA account for purposes other than the repayment of the facilities as shown in Cosmic's letter dated 25 July 2016 to the plaintiff. It was stated that Cosmic had fully utilised the monies from the HDA account 'to finish the remaining balance work'. Therefore, the defendants cannot say that the HDA account is only to be used for the repayment of the facilities.

[61] Even SPNB did not receive payments from the HDA account. This was confirmed by DW1 in cross-examination when DW1 admitted that no payments were made to SPNB from the HDA account.

[62] It is also very telling that the HDA account was not used by Cosmic to make payments for the facilities from the response of Cosmic to the plaintiff's notices of termination. In Cosmic's letter dated 5 August 2014 in response to the plaintiff's notices of termination, Cosmic did not instruct the plaintiff to take monies from the HDA account. It was admitted by DW1 in cross-examination that Cosmic only requested the plaintiff to put on hold legal proceedings and undertook to pay the balance.

Variation of terms to payment from HDA account

[63] It is the defendants' contention that the terms of the facilities were varied by way of the supplemental letter of offer dated 30 November 2012, from monthly instalment payments to payments from HDA account, sale proceeds and sold and unsold units only and that the defendants also have no liability under the facilities.

[64] DW1's only evidence on how the payments for the facilities were to be effected was found in Q&A No 7 and Q&A No 8 of WS DW1A where he stated that pursuant to the business collaboration agreement, 60% from the proceeds from end finances of the units purchased would go to the HDA account, the signatories of which being the plaintiff and SPNB. According to

DW1, SPNB would get 10% of the money in the HDA account and 20% would be for the development costs and that the arrangement would have settled the loan with the plaintiff. Further, a term of the business collaboration agreement was the assignment of all the unsold units of the project, and the deed of assignment of the amount in the HDA account.

[65] The plaintiff submitted, and I agree, that the evidence given by DW1 on the payment arrangement with SPNB under the business collaboration agreement was erroneous as the business collaboration agreement does not contain such a term. What actually was provided is that 30% of the proceeds in the HDA account would be paid to SPNB. This was provided in cl 3.6:

> In furtherance of Clause 3.4 and 3.5 above; the parties hereto hereby agree that from each of the monthly instalments due under the First and Second Tranche as derived from the proceeds of sale of units and paid into the HDA account at every month end, SPNB shall be entitled to a sum of Thirty Percentum (30%) based from the Architect Certificate.

[66] In relation to this term, nowhere in the business collaboration agreement did it state that only 10% went to SPNB and 20% went to development costs. Also, there is no evidence from DW1 that it is the plaintiff's payment term that the 60% from the HDA account stating that 60% of the end finances would go to the HDA account without stating who gets the other 40% of the end finances.

[67] It is also relevant that the plaintiff is not a party to the business collaboration agreement between Cosmic and SPNB and the plaintiff is not bound by the terms therein.

[68] As for whether the facilities had been varied from a monthly instalment to a purely 60% payment from the HDA account, there is no evidence from from DW1 to this effect. The court observes that PW1 had never admitted that there is no instalment due and that payment should be from the HDA account. Also, DW1 did not give any evidence on whether the supplemental letter of offer dated 30 November 2012 varied the terms of payment of all three facilities from a monthly instalment financing to a purely payment from HDA financing either in his witness statement (WS DW1A) nor in his additional witness statement (WSDW1B).

[69] DW1's evidence in Q&A No 9–11 of WS DW1A is as follows:

> 9. The project went through some hiccups and now the project is being completed by another contractor, Hong Xin Construction Sdn. Bhd. One Block has been completed and there is no reason why the sums in the HDA amount is not being

pursued by the plaintiff and not transferring money for the 300 plus units which remains uncollected and/or done to the plaintiff.

10. The Bank is still holding the deed of assignment of the unsold units and the Assignment of the sums in the Housing Developers Account and titles to the Taman Villa Land in Yong Peng, Johor. Further, they are also having the original titles for the 21 acres of the Taman Seri Molek Perdana Project in Johor Bahru.

11. The Bank is completely ignoring the fact that there is available money and more coming to be collected for the repayment of the loan.

[70] I agree with the plaintiff that this is only in the form of a suggestion since there is money in the HDA account and the plaintiff has an assignment over it, the plaintiff should pursue this money and the plaintiff was wrong in not doing it. This is not evidence of any variation of the terms of the facilities.

[71] The defendants rely on the terms of supplemental letter of offer dated 30 November 2012 to argue that the terms of the facilities have been varied from monthly instalment payments to payments from HDA account, sale proceeds and sold and unsold units only. It is stated that cl 12 of the original letter of offer dated 6 March 2007 and the supplemental letters of offer dated 22 February 2008 and 14 April 2011 were amended to now read:

Payment of sale price

The payment of the sale price of new. TF-i and existing Term Financing-i and Revolving Credit-i facilities shall be by way of 60% deductions of the sales proceeds captured in the HDA account after excluded the mandatory deduction to SPNB received from the sale of the development project known as Taman Seri Molek Perdana, Plentong, Johor Bahru, Johor.

The percentage of deduction of proceeds is subject to review by Bank from time to time.

[72] However, I agree with the plaintiff that by interpreting the terms of the supplemental letter of offer dated 30 November 2012 to be read as the terms of the facilities being varied from from payment by monthly instalments to payment solely via deductions from the HDA account, the defendants are asking the court to rewrite the terms of the agreements relating to the facilities. This is something that the court cannot do (see *Wong Pa Hock v American International Assurance Co Ltd & Anor* [2001] MLJU 688; [2002] 2 CLJ 267 (High Court), *Agromate (M) Sdn Bhd v KTS Trading Sdn Bhd* [2017] MLJU 1815; [2017] 1 LNS 1707 (Court of Appeal) and *Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597; [2010] 1 CLJ 269 (Federal Court)).

[73] The supplemental letter of offer states expressly that only the specific terms referred to in the said letter is varied and all other terms and conditions

remains unchanged. Although in cl 12 of the supplemental letter of offer it is stated that payment shall be by way of 60% deductions of the sales proceeds captured in the HDA account after excluding mandatory deductions, this must be read in relation to other agreements and documents (see *Wasco Coatings Malaysia Sdn Bhd v Nacap Asia Pacific Sdn Bhd & Ors* [2015] MLJU 2110; [2015] 5 CLJ 462 (Court of Appeal)).

[74] When read with provision in the original letter of offer dated 6 March 2007 it is clear that the sale price must be paid by way of instalments at the end of every month or paid in full at the end of the tenure the facilities. Only para B of cl 12 in the original letter of offer dated 6 March 2007 is amended and paras A to E remain unchanged. Paragraph C provides that payment of the sale price is either by way of instalments as provided in para A or by way of deduction from or HDA in para B, 'whichever is earlier'. Paragraph D of cl 12 of the original letter of offer provides that Cosmic remains liable to pay any differences in payment short of the instalment due. There is no term which states that payment is solely from the HDA account and that Cosmic is without obligations of making payment.

[75] To interpret the supplemental letter of offer dated 30 November 2012 as submitted by the defendants will result in a construction which is not commercially sensible as any financing would always involve monthly payments and have a definite tenure requiring payment in full upon the completion of its tenure regardless of the payments being made from the returns of the project. The role of the court is to interpret the contract in a sensible fashion (see *Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd*, *Loh Wai Lian v SEA Housing Corporation Sdn Bhd* [1987] 2 MLJ 1; [1987] 1 LNS 37 (Privy Council) and *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 (House of Lords). The plaintiff should not be tied to the completion and abandonment of the project it financed.

[76] I agree with the plaintiff that in this case, although leeway was given to Cosmic to make payment from the HDA account for the monthly instalments it is still obliged to pay for the differences. DW1 admitted in cross-examination that where the monthly instalment deduction from the HDA account is insufficient to meet the respective monthly instalment, Cosmic shall pay for the shortfall amount in the HDA account.

[77] The defendants submitted that PW1 had admitted that there were no instalments due based on the letter of offer and facilities agreements as payments are to come from the HDA account. However, this was without reference to any part of the PW1's evidence from the notes of evidence or WS PW1. Throughout the PW1's cross-examination, she also disagreed with the

defendants' counsel suggestion that there were no instalments due as payments are to come from the HDA account. Therefore, I do not regard that there was any admission by the PW1 in that respect.

[78] Given the above findings, this court concludes that the terms of the facilities were not varied by way of the supplemental letter of offer dated 30 November 2012, from monthly instalment payments to payments from HDA account, sale proceeds and sold and unsold units only. Cosmic is liable under the facilities to pay by monthly instalments.

Control of HDA account

[79] The defendants' contention is that the HDA account is controlled by the plaintiff and the plaintiff was negligent in ensuring that the payments for the facilities were made from the HDA account. This is pleaded in para 22 of their defence:

> Sebagai jawapan kepada perenggan 11 Penyataan Tuntutan, Plaintif telah gagal atau cuai untuk mengambil sebarang tindakan untuk memastikan bahawa SPNB membayar kesemua wang daripada HDA akaun dan bahawa kesemua wang dibawah deed of assignment dibayar kepada Plaintif, Plaintif tidak berhak mengambil tindakan terhadap Defendan-Defendan.

[80] In support of this contention, the defendants rely on the following evidence:

(a) in DW1's re-examination his evidence was the sale proceeds in HDA account from the project by way of a supplementary deed of assignment is assigned to the plaintiff and the HDA account was handled by SPNB and the plaintiff:

> CHOK: OK. All the sale proceeds in HDA account from housing development known as Seri Molek Perdana. Supplementary deed of assignment, that is assignment to Bank Rakyat, yes.
>
> SC: Who is handling the HDA account?
>
> CHOK: SPNB and Bank Rakyat.

(b) PW1 admitted in cross-examination that the plaintiff was a signatory to the HDA accounts:

> SC: Apakah maksud Puan joint signatories yang Puan bacakan dalam Klausa 15 dan 16 letter tersebut, Puan? Tadi saya rujuk ini surat. 'Shall be', 'shall.' 'Shall' Puan kata beberapa kali 'mesti.' Jadi, Klausa 15 pun kata 'shall', Klausa 15 pun, 16 pun kata 'shall/Setuju kah Bank menjadi co-signatories?
>
> NURY: Yang Arif, joint signatories bermaksud penandatangan bersama.
>
> SC:Puan, sorry, Yang Arif. Puan, saya merujuk kepada dokumen Bank

sendiri. Your own documents kata co signatory. Saya tanya apa maksud, Puan kata Bank menanda, penandatangan bersama. Joint signatory. Jadi, isu tersebut adalah adakah wang boleh dikeluarkan tanpa kebenaran pihak Bank?

NURY: Yang Arif, klausa ini menyebut Bank sebagai penandatangan bersama.

SC: ... Puan, boleh wang dikeluarkan tanpa Bank menandatangani dokumen? Cek. Boleh cek dikeluarkan tanpa Bank co-signatory to the cheques?

NURY: Tidak, Yang Arif.

[81] The defendants also submitted that the plaintiff failed to call the relevant officers, Tun Yazli Hismul Asri Yaacob and Abdul Razak Abu Bakar, officers who signed the plaintiff's supplementary letter of offer dated 30 November 2012, who PW1 confirmed were still working in the plaintiff's bank.

[82] The court also observes (although not submitted by the defendants) that DW1's evidence in chief in his witness statement said:

23. Again, the plaintiff is making a mistake when it should have included SPNB the other signatory to the HDA account which has all the money to pay the plaintiff and which the plaintiff is a signatory and beneficial owner of its proceeds. The plaintiff is also signatory to the HDA account. All that is required for the Bank to execute its right in the security agreements and transfer the sums of money due to it from the HDA account and take over and collect the money from the unsold units which were sold in the projects.

[83] The plaintiff submitted that the HDA account is in actual fact, run by Cosmic. The plaintiff relies on the following evidence:

(a) in the *Hong Xin* case, Cosmic admitted that the HDA account was run by Cosmic which was addressed by the court in para 25 of the judgment:

> [25] DW1 also stated HDA is run by Cosmic because of the PA from SPNB to Cosmic.

(b) when put to DW1, he admitted that the HDA account is run by Cosmic:

> MM: I put it to you that it is run by Cosmic.
>
> Chok: Yes, right. Yes, right.

(c) DW1 admitted in cross-examination that Cosmic knows exactly the monies coming in and out of the HDA account and the exact balance in

A the HDA account at all given times. DW1 also admitted that any withdrawals from the HDA account is by request from Cosmic.

[84] In respect of the issues of the HDA account signatories, the plaintiff submitted that evidence of the signatories of the HDA account is the letter by
B SPNB dated 1 March 2012 which is not an exhibit before the court nor an ID document should not be considered by the court.

[85] Further the defendants have failed to discharge their own burden of proof to bring evidence of the signatories. The burden of proof is on the
C defendants as this their case.

[86] The plaintiff further submitted that even if the letter dated 1 March 2012 is considered, from the letter it cannot be concluded that the only
D signatories to the HDA account are only the plaintiff and SPNB. There are three groups (Group A, Group B and Group C) of which the plaintiff's officers are listed in Group C and no evidence is given or particulars stated as to who the signatories of Group A and Group C are, which could possibly be from SPNB and Cosmic.

E

[87] The plaintiff further submitted that as cl 4.2 of the business collaboration agreement provides that the HDA account 'shall be operated by joint signatories of SPNB and CMDSB', SPNB and Cosmic are the other two parties who provide signatories for the HDA account. As the condition
F requires two signatories to sign (one signatory from Group A and one signatory from Group C or one signatory from Group B and one signatory from Group C) it means that this was to ensure that the plaintiff is made aware of every withdrawal either by SPNB or Cosmic which does not amount to giving complete control of the HDA account to the plaintiff. This is consistent with
G DW1's admission that whatever withdrawal is by request from Cosmic.

[88] From the evidence, it is clear that the HDA account was under the control of Cosmic and not the plaintiff. It is not correct for the defendants to say that the plaintiff could execute its right in the security agreements and
H transfer the sums of money due to it from the HDA account and take over or collect the money from the unsold units which were sold in the projects.

[89] By Cosmic's own admissions in cross-examination, the HDA account was at all relevant times, under the control of Cosmic. To summarise, in
I cross-examination, DW1 admitted to the following:

(a) the HDA account was run by Cosmic;

(b) Cosmic knew exactly the monies coming in and out of the HDA account;

(c) Cosmic knew exactly the balance in the HDA account at all given times; and

(d) any withdrawals from the HDA account was by request from Cosmic.

[90] There is no breach of obligation by the plaintiff to ensure that SPNB pays all monies from the HDA account and under the deeds of assignment to the plaintiff which bars the plaintiff's right to take action against defendants.

[91] The burden of proof is on the defendants to bring evidence to support the allegation that the plaintiff is in control of the HDA account. This burden was not discharged by the defendants.

[92] Cosmic's allegation that the signatories to the HDA account are only SPNB and the plaintiff is without merit as the SPNB letter dated 1 March 2012 has no evidential value. This is not an exhibit tendered as evidence during the trial.

[93] In any event the SPNB letter dated 1 March 2012 does not support the defendants' contention as it also shows that apart from the plaintiff's signatories of the HDA account in Group C, there are also signatories from two other groups, Group A and Group B who are not identified by the defendants and in relation to which no evidence was given. It cannot be said that the plaintiff was in control of the HDA account when there were signatories from other groups.

[94] Further as cl 4.2 of the business collaboration agreement provides that the HDA account shall be operated by joint signatories of SPNB and Cosmic, as a matter of logic, the signatories from the other groups were from SPNB and Cosmic. The plaintiff thus did not have complete control of the HDA account when withdrawals also required one signatory either from Group A or B of which one of the signatory group is Cosmic.

[95] Even if the plaintiff's officers who were signatories of the HDA account are not called as witnesses, the presumption of adverse inference is not invoked as it is the defendants' burden to prove how the HDA account operates. Further, the plaintiff has demonstrated through the DW1's own admissions in cross-examination and documentary evidence that the plaintiff did not have full control of the HDA account.

Whether plaintiff was to use the proceeds from the assignments of contract procceds, designated account and unsold units, debentures and all of the security documents first before demanding any payments from the defendants

HDA account as security only

[96] The plaintiff submitted that the assignment of the HDA account to the plaintiff is only as a security for the facilities. This was provided in the terms and conditions contained in the agreements of the facilities:

(a) cl 13.1 of the deed of assignment of designated account dated 8 January 2008 for the first facility:

> The Assignment created herein is expressly intended to be and shall be a continuing security for all moneys ... due and payable to BKRM ...

(b) cl 5 of the deed of assignment dated 17 October 2011 for the second facility:

> The security created by this Assignment is expressly intended to be and shall be a continuing security for all moneys ... owing by the Customer to the Bank ...

(c) cl 1 of the supplemental agreement third party deed of assignment (by way of sale proceeds) dated 28 March 2013 for the third facility:

> ... the Third Party deed of assignment (By way of Sale Proceed) shall henceforth be the security for the Second Financing Facility in addition to the Third Party deed of assignment (By Way of Sale Proceed) being security for the Existing Financing Facility ...

[97] The plaintiff also relies on admissions of DW1 in cross-examination to show that Cosmic was aware that the assignments over the HDA account was for security for payments of the facilities. DW1 admitted the following in cross-examination:

(a) pursuant to cl 13.1 of the deed of assignment for the first facility, the assignment is intended to be and shall be a continuing security for all monies whatsoever now or hereafter from time to time due and payable to the plaintiff by Cosmic;

(b) pursuant to cl 5 of the deed of assignment for the second facility, the assignment is to secure the repayment of the second facility;

(c) the assignment under the second facility is extended to the third facility; and

(d) regardless of whatever security, Cosmic had agreed that it will pay instalments punctually when it falls due.

[98] The plaintiff submitted that the HDA account was assigned merely as a means of payment, but it was not the only method of payment as it was

intended as an assurance for payment. The plaintiff relied on an admission by DW1 in cross-examination that the HDA account was assigned as an assurance for payment.

[99] The plaintiff's counsel referred the court again to the case of *Hong Xin Construction Sdn Bhd v Cosmic Master Development Sdn Bhd & Anor*. Here the court rejected Cosmic's defence that payment is only from the HDA account, holding that the HDA account was only a means and not a mode of payment to Hong Xin. It was intended as an assurance that Cosmic would be ultimately responsible for payment. The court held:

> [26] The evidence would thus point to the HDA being only a means and not a mode of payment for CP no 1 to 3. It was intended as an assurance that Cosmic who awarded the LA would be ultimately responsible for payment.

[100] It is the court's finding that the plaintiff is not obliged to utilise the securities as documented in the deeds of assignments of contract proceeds, designated account and unsold units, charges and debentures before claiming for instalment payments.

[101] From the terms and conditions contained in the facilities agreements ie cl 13.1 of the deed of assignment of designated account dated 8 January 2008 for the first facility, cl 5 of the deed of assignment dated 17 October 2011 for the second facility, cl 1 of the supplemental agreement third party deed of assignment (by way of sale proceeds) dated 28 March 2013 for the third facility referred to the court by the plaintiff, it is clear that the HDA account was assigned to the plaintiff as a security to assure payments of the instalments from Cosmic. Regardless of this security, Cosmic still had the obligation to make payments for the facilities.

[102] Evidence in the form of admissions of DW1 in cross-examination shows that payments for the facilities did not come only from the HDA account and Cosmic was aware that the assignments over the HDA account was for security for payments of the facilities.

[103] The case of *Hong Xin Construction Sdn Bhd v Cosmic Master Development Sdn Bhd & Anor* is followed. Cosmic's defence that payment is only from the HDA account failed in the *Hong Xin* case and there should be no reason it should succeed here. I share the same view of the learned judge that the HDA account was only a means and not a mode of payment to the promisee (in the *Hong Xin* case it was Hong Xin Construction Sdn Bhd, the subcontractor, while in this case it is the plaintiff). Although payment to the promisee can be from the HDA account ultimately Cosmic is responsible for payment.

Shortfall

[104] The defendants submitted that there was no shortfall in the HDA account and there was never a demand made for any alleged shortfall for the HDA account. The defendants relied on the following evidence given by DW1 in re-examination:

> SC: Now, the bank everywhere has said oh, we can sue you because there's a shortfall in the HDA account, there's a shortfall, you have not paid the HDA account. Can you read the letter?
>
> CHOK: Yes.
>
> SC: Does it state anywhere, now, does it say anywhere there's a shortfall in the HDA account?
>
> CHOK: No. They never mentioned about the shortfall and all that.
>
> SC: OK. Now, does it say, now, you read the offer letter and the security documents in the bank. Does it say anywhere that you have to pay instalments to the bank?
>
> CHOK: No, there is no instalments written there.
>
> SC: This letter, does it say that you're taking [00:29:20 inaudible] from HDA account, you have failed to pay HDA account?
>
> CHOK: No. No mention about HD account in this letter.
>
> SC: Does it say anywhere there is a shortfall for HDA account?
>
> CHOK: No. They don't mention anything about ...
>
> SC: Ok. Does it say anywhere there is no payment to HDA account?
>
> CHOK: No, they don't, they just come from, they just want us to pay the money.

[105] The defendants also highlighted to the court that PW1 had no knowledge of shortfall as in cross-examination she stated that another person handled Cosmic's financing account.

[106] The defendants further submitted that as the repayments are from the HDA account then the defendants can only be liable if there is a shortfall. Thus, as there had been no notice of shortfall given, the facilities were wrongfully terminated by the plaintiff.

[107] The defendants requested that P34, while having been agreed as a Part B document cannot be tendered as evidence as it is necessary for a s 90A of the Evidence Act 1950 certificate to be produced for a document printed from a computer.

[108] The plaintiff submitted that the defendants have the evidential burden of proof to show that there is sufficient money in the HDA account and there was no shortfall in the HDA account for any obligation of Cosmic to pay the repayment of the facilities. According to the plaintiff the onus is upon the defendants to bring forth the witness that can testify on the HDA account, namely SPNB, since the account belongs to SPNB and it was not for the plaintiff to call SPNB as a witness. The plaintiff submitted that the defendants did not bring any evidence at all to show that there is sufficient monies in the HDA account to satisfy the repayment of the facilities and have thus to discharge their burden to prove the shortfall.

[109] The plaintiff submitted that an adverse presumption cannot be made under s 114(g) of the Evidence Act 1950 for the plaintiff's non-calling of the relevant officers who conduct the HDA account when the burden of proof is on Cosmic as the plaintiff in the counterclaim to show that there is sufficient money in the HDA account. For this purpose, the plaintiff submitted that the onus is on Cosmic to produce witnesses that can testify on the HDA account, namely someone from SPNB, since the account belongs to SPNB.

[110] The plaintiff submitted that the HDA bank statement for the period of 31 December 2013 until 31 May 2014 (exh P33) is admissible as evidence as the absence of a certificate pursuant to s 90A of the Evidence Act 1950 does not preclude the statements as the defendants agreed for the placement of the account in Part B of the Common Bundle of Documents.

[111] The plaintiff's counsel highlighted to the court that the DW1 himself admitted during cross-examination that there were shortfalls at the end of the tenure of the facilities, which, according to his own admission, ought to be paid by Cosmic. DW1 agreed with plaintiff's counsel that at the end of February 2014 there was a shortfall for the full repayment of the first facility from the HDA account, after the tenure was extended to 28 February 2014 there was a shortfall to repay the second facility and there was a shortfall in the HDA account at July 2014 for full repayment of the third facility.

[112] The court finds that the defendants have failed to show that the money in the HDA account was sufficient to satisfy the repayment of the facilities. Therefore, a shortfall was created and there was an obligation on Cosmic to pay.

[113] The court agrees with the plaintiff that as it is Cosmic that alleged that there is sufficient money in the HDA account, the defendants have the evidential burden of proof to show this and the evidential burden cannnot be shifted to the plaintiff without the defendants first proving their case (see *Hong Yik Trading v Liziz Plantation Sdn Bhd* [2017] 5 MLJ 398; [2017] 8 CLJ 491

(Federal Court)) — in a trial the party who asserts that the facts exists has the burden of proof, applying s 101 of the Evidence Act 1950. The onus shifts from one side to the other only if the evidence is prima facie sufficient to establish the case of the party on whom the onus lies.

[114] An adverse presumption cannot be made under s 114(g) of the Evidence Act 1950 when the burden of proof is on Cosmic as the plaintiff in the counterclaim to show that there is sufficient money in the HDA account (see *Selvaduray v Chinniah* [1939] 1 MLJ 253; [1939] 1 LNS 107 (Supreme Court). Here, the onus is on Cosmic to produce witnesses that can testify on the HDA account, namely someone from SPNB, since the account belongs to SPNB. The plaintiff's non-calling of the relevant officers who conduct the HAD account does not attract the presumption of adverse inference.

[115] The HDA bank statement for the period of 31 December 2013 until 31 May 2014 (exh P33) is admissible as evidence. The absence of a certificate pursuant to s 90A of the Evidence Act 1950 does not preclude the statements of account as the defendants agreed for the placement of the account in Part B of the Common Bundle of Documents. *Mohamad Fauzi bin Che Rus v JR Joint Resources Holdings Sdn Bhd* [2016] MLJU 62; [2016] 6 CLJ 266 (High Court) is followed.

[116] DW1 himself admitted during cross-examination that there were shortfalls at the end of the tenure of the facilities, which, according to his own admission, ought to be paid by Cosmic. DW1 agreed with plaintiff's counsel that at the end of February 2014 there was a shortfall for the full repayment of the first facility from the HDA account, after the tenure was extended to 28 February 2014 there was a shortfall to repay the second facility and there was a shortfall in the HDA account at July 2014 for full repayment of the third facility.

Correctness of facilities statement of account

[117] It is the defendants' contention that the facilities statement of account tendered by the plaintiff (P34) was erroneous. According to the defendants there were much more deductions than shown in the statement. The defendants also complained that the plaintiff has not tendered the accounts for both the HDA and for the facilities account to show exactly how much has been paid to date.

[118] From DW1's examination in chief, there is no such evidence from DW1 stating that the statement was erroneous. It appears that this submission is a statement by counsel for the defendants from the bar.

[119] In any event, the defendants did not cross-examine the plaintiff's witnesses on the statements of account to put their case to the plaintiff's witness. The defendants' counsel only says that column two of the facilities statement of account at p 25 of encl 123 (P34) indicates an erroneous calculation of the entries as there are much more deductions than this. No specific questions were put to PW1 and PW2 about this alleged error to allow them to provide an explanation. The defendants' counsel did not cross-examine either of the plaintiff's witnesses on the correctness of the plaintiff's statements of account.

[120] In the cross-examination of PW2, it was not put to him that the plaintiff's statements are erroneous. PW1 was only questioned on p 24 of encl 123 (the plaintiff's statement of account for the period between 1 January 2000 to 10 July 2014) with regards an entry on 31 January 2008 with the particular 'conversion discp. B/F'. PW1 stated that as the plaintiff was using a new system the word 'conversion' referred to the total of withdrawals before the use of the new system.

[121] The court is constrained not to consider the defendants' submissions relating to the plaintiff's statement of account being erroneous (see *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770; [1995] 3 CLJ 639 (Court of Appeal)).

Whether the plaintiff was entitled to end the three facilities/whether the facilities were wrongly, revoked or cancelled

Valid grounds for termination

[122] The defendants pleaded that Cosmic had no liabilities under the facilities in para 79(d) and para 84 of the defence and counterclaim:

(a) para 79(d):

> Tidak ada sebarang wang di bawah kemudahan pembiayaan yang perlu dibayar oleh Defendan-Defendan untuk pembayaran kos pembiayaan.

(b) para 85:

> Defendan-Defendan juga tidak mempunyai liabiliti di bawah Perjanjian pembiayaan atau sebarang liability di bawah kesemua kemudahan Pembiayaan Term, Kemudahan Modal dan Kemudahan Kerja dan Kemudahan Berjangka seperti di dalam perenggan 6 Pernyataan Tuntutan.

[123] In consequence the defendants pleaded that the termination was wrongful in para 86 of the defence and counterclaim:

Plaintif secara salah tidak sah dan tidak mengikut segala undang-undang telah menarik balik, menamatkan, berhenti atau tidak meneruskan dengan Kemudahan Perbiayaan secara salah iaitu:

(a) Kemudahan Perbiayaan Term Financy i

(b) Kemudahan Modal kerja i

(c) Kemudahan Berjangka i

[124] The defendants then prayed in their counterclaim for 'a declaration that the plaintiff wrongfully and unlawfully terminated, recalled and discontinued the financing facilities'.

[125] Cosmic's contention that the termination of the facilities was wrongful because there is no money under the facilities to be paid by the defendants for the payment of financing costs and the defendants do not have any liability under the facilities flies in the face of documentary evidence and DW1's admission in cross-examination.

[126] In Cosmic's letter dated 5 August 2014 it was admitted that as at August 2014, there is an outstanding amount of RM30.5m due to the plaintiff. Cosmic stated:

The total estimated loan outstanding to your esteemed bank to date as per record is approximately RM30.5 Million.

[127] DW1 in cross-examination admitted that Cosmic has an outstanding loan with the plaintiff of approximately RM30.5m and by the end of 2014 Cosmic still had not paid the outstanding amount for the facilities which continued until today.

[128] Cosmic in its own pleadings at para 40(b) of the defence and counterclaim also admitted that the plaintiff will have a cause of action against Cosmic only when there is a shortfall in the HDA account to repay the facilities:

(b) Plaintif hanya boleh mengambil tindakan terhadap Defendan-defendan hanya jika terdapat kekurangan hasil jualan.

[129] As addressed in the earlier part of these grounds, it was also admitted by DW1 in cross-examination that based on the pleading the plaintiff could take action against Cosmic when there is shortfall in the HDA account.

[130] In Cosmic's own letter dated 5 August 2014 in response to the plaintiff's termination notices dated 10 July 2014, Cosmic failed to raise any issue that

the notices were wrongful which was admitted to by DW1 in cross-examination. Neither did Cosmic, in its subsequent letters dated 2 February 2015, 8 September 2015, 15 September 2015, 25 July 2016 and 16 February 2017, raise the issue that the termination was unlawful. In these letters, Cosmic only promised to repay the facilities and appealed to the plaintiff to defer legal proceedings, which was admitted to by DW1 in cross-examination.

[131] In view of the overwhelming evidence above, the court finds that the plaintiff had valid grounds for the termination of the facilities as there is an outstanding amount under the facilities due to a shortfall, which Cosmic had failed to pay to the plaintiff, entitling the plaintiff to take action against Cosmic for the recovery of the amount outstanding.

Premature recall of facilities

[132] The position taken by the defendants that the letter of demand issued by the plaintiff dated 29 May 2014 was premature and the plaintiff had prematurely filed its writ on 15 May 2015 as the facilities were not expired at that point.

[133] The defendants submitted that for the first facility, pursuant to the letter of offer dated 6 March 2007, the plaintiff was required to pay 36 monthly instalments which began in February 2008 (the first disbursement) and ended in January 2011 but when the facility lapsed in January 2011, four months later by way of a letter dated 15 April 2011 the plaintiff reviewed the repayment tenure to 58 months. The letter reads:

> 4.0 Tenure
>
> TF-i
>
> 58 (Fifty Eight) months.

[134] According to the defendants, based on this revision, the tenure of the facility now ends on 28 December 2014.

[135] In the cross-examination of PW2, the witness was referred to the letter dated 15 April 2011. The defendants submitted that PW2 admitted that the facility was recalled prematurely as he had stated that the facility which was originally 36 months was extended by 58 months by the letter dated 15 April 2011 after the original period of 36 months had expired.

> RG: ... Saya terus kepada letter of extension of facility tenure yang dikeluarkan pada 15.04.2011. En Zaifirol pernah lihat surat ini?
>
> ZAIFIROL: Pernah.

A RG: Dan di dalam surat ini dia menyatakan 58 bulan tenure ... ditambah dari 58 bulan ya. Sekiranya dilihat, kalau kita ikut surat letter of award dulu dia berakhir dalam 36 bulan.

ZAIFIROL: Ya.

B RG: Dan kamu setuju tak pada bulan Januari 36 bulan itu telah berakhir, yang pertama letter of offer itu, setuju? Tadi yang saya beritahu darl 31.01.2008 dia berakhir pada Januari 2011. So surat tawaran Ini telah dibuat selepas tiga bulan dari lapse the first letter of offer, setuju?

ZAIFIROL: Betul.

C

[136] Based on this, the defendants went on to submit that the letter of demand dated 29 May 2014 was premature as the facility only expired in 2015. The court notes that this is probably a rounding up of the date of 28 December D 2014 relied on by the defendants as the expiry date earlier. However, I also note that the defendants did not explain how this date of 28 December 2014 was derived.

[137] The defendants also submitted that the third facility was recalled E prematurely when the letter of demand was issued in May and June 2014 although the third facility expired in July 2014 based on the tenure of 15 months stated in the letter of offer dated 14 March 2014 and the first disbursement on 10 April 2013. The defendants referred the court to the evidence in PW2's cross-examination:

F

RG: Dan pada tarikh-tarikh ialah pada bulan Mei dan bulan Jun, ya. 19hb Jun surat yang dihantar kepada Cosmic barulah hari itu expiry of the 15 months. Setuju atau tidak yang dikatakan tadi? So that June date just now Tuan had given, I mean En Zaifirol had given is, July was the expiry date but you had send the letter of demand in May to the guarantors and in June to the bank I mean to the customer, G peminjam. But the agreement oniy lapses or ends in July as what you said, En Zaifirol.

ZAIFIROL: Betul.

H **[138]** The only evidence by DW1 on this issue was that in cross-examination DW1 admitted that there was no extension but parties were still negotiating.

[139] The plaintiff submitted that, and I agree, that from the excerpt of the Notes of Evidence quoted by the defendants there is no admission by PW2 that I the first facility expired in 2015. What was only agreed by PW2 was that the supplement letter of offer dated 15 April 2011 was given out three months after the lapse of the first facility in January 2011.

[140] PW2 then went on to explain that the 58 months extension starts from

the first letter of offer ie first disbursement:

RG: Sekiranya ada lapse ya bolehkah dikatakan ini 58 ini dia rujuk balik pada 2008 atau dia start afresh dari tarikh 15hb April.

ZAIFIROL: Dia merujuk kepada surat tawaran yang asal.

[141] The plaintiff also explained to the court that the supplemental letter of offer dated 15 April 2011 was superseded by the supplemental letter of offer dated 30 November 2012 which states that the tenure of the first facility expires on 28 February 2014. Thus, according to the plaintiff it is irrelevant to consider the tenure provided by the supplemental letter of offer dated 15 April 2011 since the subsequent supplemental letter of offer dated 30 November 2012 amended it.

[142] As for PW2's admission in cross-examination of the premature recall of the third facility as submitted by the defendants, the plaintiff submitted that the quoted excerpt of the Notes of Evidence of PW2 by the defendants did not show this admission. It was pointed out to the court that PW2's evidence in cross-examination subsequently was that he rejected the suggestion that the recall it is premature:

RG: So bolehkah kamu setuju bahawa, so setujukah En Zaifirol bahawa letter of demand ini pra-matang?

ZAIFIROL: Tidak.

[143] The plaintiff further submitted that PW2 was referred to the plaintiff's the letter of demand dated 19 June 2014 and not the termination letter dated 10 July 2014 thus the PW2 agreed that the letter of demand was issued before the expiry of 15 months. However, the third facility was not terminated by the letter of demand dated 19 June 2014 but by the letter of termination dated 10 July 2014.

[144] The court agrees with the submission of the plaintiff. The tenure of the first facility was superseded by the supplemental letter of offer dated 30 November 2012 which stated that the tenure of the first facility expires on 28 February 2014. The court also finds that there is no admission by PW2 that the first facility was recalled prematurely and PW2 explained that the 58 months started from the first letter of offer dated 6 March 2007.

[145] Also the court accepts that there was no admission by PW2 in cross-examination that the third facility was recalled prematurely. On the contrary, PW2 did not agree to the suggestion of defendants' counsel that the recall was premature.

[146] As PW2 was referred to the plaintiff's the letter of demand dated 19 June 2014 and not the termination letter dated 10 July 2014 the PW2's agreement that the letter of demand was issued before the expiry of 15 months was of no consequence as the third facility was not terminated by the letter of demand dated 19 June 2014 but by the letter of termination dated 10 July 2014.

[147] DW1's evidence in cross-examination that although there was no extension, parties were still negotiating is of no value. Negotiations do not amount to a contract or confer rights to Cosmic (see *Dato' Low Mong Hua v Banting Hock Hin Estate Co Sdn Bhd & 8 Ors* [2003] MLJU 449; [2003] 1 LNS 387).

[148] In view of the above, the court finds that there was no premature recall of the facilities by the plaintiff.

Whether the plaintiff had breached its obligation under the facilities

[149] One of the defendants' prayers in the counterclaim is for 'a declaration that the plaintiff breached its obligations under the Financing Facilities'. The defendants in their submission did not specify which obligation of the plaintiff under the facilities was breached. However, from the defendants' submissions the court surmises that this issue relates to the issue of whether the facilities were wrongly, revoked or cancelled by plaintiff. Also, it appears that this relates to the issue of whether there was a breach of obligation by the plaintiff to ensure that the monies from the HDA account are used for the repayment of the facilities. These were answered in the negative above. Therefore, the court finds that the plaintiff did not breach its obligations under the facilities.

Whether the business collaboration agreement and the supplementary agreement were terminated as a result of the plaintiff's termination of the facilities and enforcing the JID, including the winding up action

[150] The defendants contended that in its submissions that as a result of the actions of the plaintiff in terminating the facilities the defendants had suffered losses arising from the following:

(a) Cosmic could not continue with the project;

(b) the development agreement, business collaboration agreement and supplementary agreement were affected and Cosmic was unable to fulfill its obligation under the SPNB agreements causing SPNB to terminate the agreements through a letter dated 30 October 2019 which caused Cosmic to be unable to fulfill its obligation under the agreements; and

(c) Cosmic was forbidden and was unable to continue to build the project units and lost opportunities to continue with the completion of the project.

[151] This relates to the defendants' prayer for damages to be assessed for the losses suffered by the defendants arising from the breach of the SPNB agreements, said to be caused by the plaintiff's termination of the facilities.

[152] The court finds that there was no evidence from the defendants on how the termination of the facilities caused the project to be affected and could not be completed or how the termination caused the termination of the business collaboration agreement, development agreement and supplementary agreement. From Cosmic's evidence given by DW1 through his examination in chief (Q&A No 20 of WSDW1A), the defendants appear to take the position that the plaintiff's winding up petition dated 19 August 2019 caused SPNB to terminate the business collaboration agreement, development agreement and supplementary agreement. It is observed that the termination of the SPNB agreements due to the winding up petition was never pleaded by the defendants in the defence and counterclaim. On this ground, the court should reject this evidence.

[153] SPNB issued a letter dated 30 October 2019 to Cosmic informing Cosmic that the extensions of time until 31 December 2019 for Cosmic to complete the project and until 31 March 2020 to make the payments due to SPNB applied for by Cosmic by way of its letter dated 15 July 2019 was rejected. SPNB did refer to the winding up proceedings against Cosmic, stating:

> Pihak kami juga telah mendapati bahawa pihak tuan kini sedang berhadapan dengan tindakan penggulungan di bawah Akta Syarikat, 2016 oleh BANK KERJASAMA RAKYAT MALAYSIA BERHAD sebagai pempetisyen yang mana prosiding ini sedang berjalan di Mahkamah.

[154] However, this was not the reason given for the termination (if any) of the SPNB agreements. SPNB in its letter informed Cosmic that Cosmic did not complete the project within the stipulated completion period and Cosmic's requests for extensions were rejected and Cosmic was asked to vacate the project site. SPNB stated:

> Setelah mempertimbangkan perkara-perkara tersebut di atas dan mengambil kira kepentingan para pembeli yang menjadi keutamaan iaitu untuk menyiapkan Projek tersebut dan menyerahkan unit-unit rumah tersebut dengan secepat yang mungkin, SPNB dengan ini menolak permohonan pihak tuan untuk lanjutan masa dan maka dengan itu, tempoh BCA tersebut telah luput.

A Sehubungan dengan itu, pihak tuan dengan ini juga diberi notis bahawa BCA adalah ditamatkan dan SPNB selaku pemegang lesen pemaju perumahan bagi Projek tersebut akan menguatkuasa hak kami untuk mengambil alih Projek tersebut dan seterusnya menyiapkan Projek tersebut sehingga pengeluaran CCC. Dalam keadaan demikian, SPNB juga berhak untuk melantik mana-mana pihak untuk
B melaksanakan kerja-kerja pembinaan sehingga siap sepenuhnya.

Sejajar dengan keputusan SPNB tersebut di atas, pihak tuan adalah diminta untuk mengosongkan tapak Projek tersebut dengan serta merta khususnya menghentikan segala dan sebarang aktiviti-aktiviti yang berkaitan dengan kerja-kerja pembinaan dan/atau pembangunan bagi Projek tersebut termasuk (namun tidak terhad
C kepada) pemasaran, jualan dan/atau pembiayaan.

[155] In SPNB's letter, which was a reply to Cosmic's request for extension of time in Cosmic's letters dated 10 April 2019 and 15 July 2019, SPNB was not
D terminating the business collaboration agreement but was giving notice that the agreement had expired and no further extension of time was given. Thus, Cosmic was not terminated but had failed to fulfil the terms of the business collaboration agreement which was to complete the project by 25 January 2013, which was within 20 months from 25 July 2011, the date of the business
E collaboration agreement.

[156] DW1 admitted in cross-examination that according to cl 9 of the business collaboration agreement, the project shall be completed by 25 January 2013. The supplementary agreement dated 22 April 2016 was entered into as
F Cosmic failed to complete the project by 25 January 2013 but the completion date of the project was not varied as clearly stated in cl 5 of the supplementary agreement. The supplementary agreement only rescheduled the payment by Cosmic to SPNB. DW1 also admitted in cross-examination Cosmic's request for extension was rejected due to the expiry of the business collaboration
G agreement period, causing the business collaboration agreement to be terminated, allowing SPNB to take back the project.

[157] Notwithstanding the above, SPNB had allowed Cosmic to complete
H the project by 31 March 2019. This was stated by SPNB in SPNB's letter dated 9 July 2018 (enclosed as Lampiran A of SPNB's letter dated 30 January 2019) and marked as P38. Cosmic also failed to complete the project by this date. In cross-examination DW1 admitted that Cosmic on 10 April 2019 (Cosmic's letter dated 10 April 2019, P40) requested for a further extension. Cosmic's
I request for extension in Cosmic's letter dated 10 April 2019 (P40) and letter dated 15 July 2019 (P41) showed that Cosmic had not completed the project within time and was in breach of the business collaboration agreement in the first place.

[158] The defendants also took a contrary position with regards the termination of Cosmic by by SPNB. In cross-examination, DW1 stated that Cosmic did not receive SPNB's letter dated 30 January 2019 and also took the position that Cosmic was not terminated as he did not agree to SPNB's letter. The defendants are not allowed to adopt one stance (that Cosmic was terminated) and then take another inconsistent stance (that Cosmic was not terminated) (see *Nabors Drilling (Labuan) Corp v Lembaga Perkhidmatan Kewangan Labuan* [2020] 12 MLJ 54; [2020] 10 CLJ 732 (Federal Court)).

[159] The court also accepts that all three facilities had been fully disbursed as shown in the plaintiff's statements of account of the facilities (exhs P34, P35 and P36). DW1 in cross-examination admitted that Cosmic had already enjoyed the full benefits of the facilities. All three facilities had matured by 2014. The full sale price of the maturity or extension date for the first facility and the second facility was 28 February 2014 and for the third facility by July 2014.

[160] DW1 in cross-examination had admitted that the sale prices for all the facilities were not paid by the maturity dates and that the sale prices for the facilities remain outstanding until now, 13 years after the first disbursement of the first facility in 2008.

[161] Cosmic had enjoyed the full benefits of the facilities as all of them had matured already before or at the time of the termination by the plaintiff on 10 July 2014. As a result of the termination, all amounts due and owing under the facilities became immediately due and payable as stipulated in cl 9.1 of the first facility asset sale agreement dated 8 January 2008, cl 7 of the second facility asset sale agreement dated 17 October 2011 and cl 9.1 of the third facility asset sale agreement dated 14 March 2013.

[162] The court thus find that there was no effect on Cosmic when the facilities were terminated by the plaintiff since the facilities had already matured and all the sale prices were already due and payable.

[163] Cosmic was aware that the facilities must be fully repaid by the end of their tenure and that it had failed to pay the sale price of the facilities on their maturity dates. This is demonstrated from DW1's admission in cross-examination that for the first facility, before the extension, the first facility should have been fully paid by 31 January 2011, at the end of the tenure of 36 months as provided in the letter of offer dated 6 March 2007. In cross-examination DW1 also admitted that when there is a shortfall (ie the monies from the project proceeds were insufficient) Cosmic has to pay the difference and that there were shortfalls for all the facilities.

[164] The upshot of this is the termination of the facilities on 10 July 2014 did not result in termination of the business collaboration agreement, development agreement and the supplementary agreement by SPNB by way of SPNB's letter dated 30 October 2019 as pleaded by the defendants.

[165] It follows that the defendants' contention that as a result of the actions of the plaintiff in terminating the facilities Cosmic had suffered losses from the uncompleted project and breach of the SPNB agreements must be rejected.

Whether the plaintiff had wrongfully filed winding up petition and this current action

[166] On the issue of whether the plaintiff had wrongfully filed the winding up petition, the court finds that the plaintiff was entitled to file the winding up proceedings against Cosmic as when the winding up petition was filed on 19 August 2019, the JID dated 30 June 2015 was not yet set aside. It cannot be said that the plaintiff is liable for wrongfully filing the winding up petition just because the JID was set aside and it also cannot be said that the plaintiff took advantage of its own wrong.

[167] The JID obtained by the plaintiff was a valid and perfect judgment until it was set aside (see *Tan Tee Peng v Tenaga Nasional Berhad* [2016] MLJU 1226; [2016] 1 LNS 574 and *CIMB Bank Bhd v Consobiz Ventures Sdn Bhd & Ors* [2018] MLJU 1233; [2018] 1 LNS 1336. As the JID was still valid at the material time when the winding up petition was filed, the plaintiff was entitled to act upon it).

[168] The defendants only filed the application to set the JID on 31 July 2019 because the plaintiff was about to file a winding- up petition after the amounts due from Cosmic could not be settled. A winding up notice was issued much earlier on 27 August 2015. The plaintiff was entitled to enforce the JID without waiting for the JID to be challenged and resisted by Cosmic.

[169] The issue of whether the plaintiff had wrongfully filed this current action relates to the defendants' prayer in the counterclaim for the plaintiff's claims against the defendants to be dismissed. It is the court's view that this issue is academic as the plaintiff's main action was withdrawn with no order as to costs with liberty to file afresh. In any event, it is the court's finding above that Cosmic had an obligation to pay the instalments for the facilities and the failure of Cosmic to do so resulted in Cosmic owing monies to the plaintiff which the plaintiff sought to recover against the defendants in the main action. Therefore, the plaintiff correctly filed this current action against the defendants.

LIABILITY OF GUARANTORS

[170] In their counterclaim, the defendants prayed also for:

(a) a declaration that the guarantees (executed by the second and third defendants) are void or set aside; and

(b) an order for the guarantees to be surrendered by the plaintiff to be cancelled immediately.

[171] Thus, the court will address the issue of whether the guarantees are void for completeness.

[172] The only submissions put forward by the defendants on the rights of the guarantors to pursue this action is that the plaintiffs are not entitled to execute or sue under the guarantees signed by the second defendant and the third defendant as the plaintiff had full knowledge that the transactions entered into would provide the plaintiff with the means to take all proceeds of project sales or unsold project units to ensure priority is given to the plaintiff to obtain financing payments. According to the defendants, the guarantees signed by the second defendant and the third defendant are void, not applicable and not enforceable by the plaintiff. Thus, all the defendants also have no liability under the facilities.

[173] Going by this submission, the success of the second defendant and third defendant in this action will depend on whether Cosmic is successful in its action that is if the defendants can establish that the plaintiff had wrongfully and unlawfully terminated, withdrawn or discontinued the facilities and that the plaintiffs have breached their obligations under the facilities. Premised on the above findings of the court that Cosmic was unsuccessful in doing so, the second defendant and third defendant's action also falls.

CONCLUSION

[174] Premised on the aforesaid reasons, the defendants' counterclaim is dismissed with costs of RM30,000.

Defendants' counterclaim dismissed with costs of RM30,000.

Reported by Dzulqarnain Ab Fatar